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TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Official Languages Act trumps *Montreal Convention*

In a 1945 novel, Canadian author, Hugh MacLennan, described the existence of "two solitudes" in Canada. Some have remarked that the term refers to "a perceived lack of communication, and, moreover, a lack of will for communication between Anglophone and Francophone people in Canada."

The *Official Languages Act* (the "*OLA*") is an attempt to bridge these two solitudes by guaranteeing Canadians the right to deal with federal institutions in either official language.

When Air Canada started out as a Crown corporation, it was a "federal institution", and thus bound by the *OLA*. When it was privatized in 1988, the legislation that gave effect to the privatization specifically provided that Air Canada would continue to be bound by the *OLA*.

In mid-July 2011, a battle took place between the *OLA* and the *Montreal Convention* liability regime (the "*Convention*"). The *Convention* lost.

The case arises from a series of flights taken by Michel and Lynda Thibodeau in January and May 2009 between Canada and the U.S. on Air Canada and Jazz (with which Air Canada had a capacity purchase agreement). On some of the transborder legs of these itineraries, the Thibodeaus did not receive services in French on check in, on board the aircraft and at the airport baggage carousels located in the relevant arrival airports.

For this, they sought a declaration that Air Canada had breached the *OLA*, an apology and damages (general and punitive).

As a starting point, it is important to note that s. 22 of the *OLA* provides that "every federal institution has the duty to ensure that any member of the public can communicate with and obtain services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities … in Canada or elsewhere where there is a significant demand for communications with and services from that office or facility in that language."

The regulations under the *OLA* define "significant demand" by specifically prescribing certain departure/ arrival cities which require bilingual service, in addition to describing circumstances in which other cities may also require bilingual service.

Air Canada conceded that, on four occasions, bilingual services were not provided to the Thibodeaus when the legislation required it. It denied responsibility for an instance at a baggage carousel because it alleged that the responsibility for making the announcement lay with the airport authority.

For its transgressions, Air Canada did not object to the Court rendering a declaratory judgment to the effect that it breached its language duties under the *OLA*. In addition, it consented to providing the Thibodeaus with a letter of apology — and went as far as to tender a draft to the Court. It did not, however, agree that any further remedy was required and denied that it had any systemic problems.

The Thibodeaus each sought general damages of $5,000 for each incident as well as $500,000 in punitive damages overall. Air Canada argued that any such damages were limited by the *Montreal Convention* for those breaches which occurred on a transborder flight. As one would expect, Air Canada cited Article 29 for the proposition that the *Convention* sets out an exclusive liability framework for international carriage by air — and, since the *Convention* does not explicitly provide a remedy, none exists.

Air Canada submitted that, in deciding the complaint, the Court must adopt an interpretation of the *OLA* that harmonizes with the *Convention* — and that, in keeping with the jurisprudence under the *Convention* and its predecessors, it is not appropriate to award damages when breaches of the *OLA* occur during international carriage by air.

The Thibodeaus (and the Commissioner of Official Languages, who was an intervener in the case) took issue.

They argued that the *Convention* does not limit the Court's power under s. 77(4) of the *OLA* to "grant such remedy as it considers appropriate and just in the circumstances."

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In meeting Air Canada's arguments, the Commissioner advanced the position that Air Canada is the only air carrier in the world that is subject to the remedy provided by the *OLA* and that it would be "illogical" to conclude that signatory countries and Canada in particular want to implicitly "achieve uniformity" of the official languages rules that apply only to Air Canada. Rather, the Commissioner argued, the *Convention* was intended to deal only with "death or bodily injury" resulting from an "accident".

In the alternative, the Commissioner argued that in a conflict between the *Convention* and the *OLA*, the latter must prevail, due to its quasi-constitutional status. In this respect, the Commissioner noted that s. 82(1) of the *OLA* explicitly provides that the relevant substantive sections of that legislation prevail where they are inconsistent with another act of Parliament.

Justice Bédard of the Federal Court of Canada began her analysis of these arguments by noting that "[i]t is clear that the *Montreal Convention* does not impose linguistic duties. Air Canada is the only air carrier subject to the *OLA*, and the matters that this legislation addresses are unrelated, as such, to international carriage and also do not concern the other countries that are signatories to the *Convention*."

But, the Court had to recognize that there was strong precedent (from *Sidhu v. British Airways*, [1997] 1 All ER 193, for example) for "strong exclusivity" — that is, the position

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Canadian Transportation Agency Annual Report

On July 28 the Canadian Transportation Agency released its annual report for the fiscal year ended March 31, 2011. That date also marks the end of the first three year period for which the Agency promulgated a strategic plan. The Agency has now published a new three year plan for the period 2011-2014. In this note we will summarize the information relating to complaints, regulatory initiatives and licensing matters found in the report and related statistical tables.

Complaints within the Agency's jurisdiction proceed, potentially, through four phases. In the first place, if a complaint is made directly to the Agency, before an attempt is made to resolve the matter directly with the carrier, the Agency will refer the matter to the carrier for possible consensual resolution. If that fails the Agency will attempt facilitation and, on consent, the matter may be referred to mediation. If resolution is not possible by any of these mechanisms, the Agency will proceed to formal adjudication.

The large majority of complaints are resolved informally (87% for 2010-2011) by facilitation or mediation. Of these, 91% were resolved within 30 days. The Agency's goal is 100%, but a number of mediated cases in the last year developed in to quite complicated disputes.

In 2010-2011, 62% of all cases requiring formal adjudication were resolved within 120 days of the commencement of the formal process. This is relatively close to the goal the Agency set itself in 2008, namely resolution of 65% of all such cases within 120 days, and is a significant improvement over recent years. The annual report notes that of 23 adjudicated cases which were not resolved within 120 days, 19 were complex cases.

A look at the statistics reveals how heavily the air mode is represented in Agency activity. Of 400 disputes resolved by facilitation in the last year 374 involved air, 9 rail, 1 marine and 16 accessible transportation. The numbers for the two most recent past years are roughly comparable. However, when we look at more formal modes of dispute resolution, the prominence of the air mode disappears. Rail carriers have been more active in the mediation of disputes and they account for about half of the small number (11 in the last year) of disputes resolved by mediation. The numbers for disputes which proceeded to formal adjudication are: air-22; rail-11; marine-21; accessible transportation-7.

As of the end of the last fiscal period, 219 air travel complaints were in the facilitation process (similar to 2009-2010 and down from 448 in 2008-2009). The number for foreign carriers was 119 (earlier two years were 136 and 201 respectively). If this trend holds it will give credence to the Agency's assertion that it has had success in making its procedures more efficient and reducing the backlog of cases in progress. However, the number of complaints made against air carriers has declined markedly over the last three years. The total stood at 1,352 in 2008-2009. This dropped to 817 the following year and 328 for the year ended March 31, 2011.

The issues raised in these complaints each show a declining pattern. The Agency reports on all complaints made to it, whether or not it has jurisdiction in respect of the mater. Thus, complaints about quality of service (65, down from 314 two years ago) and safety (0 from 13) continue to be made although they are outside the Agency's jurisdiction. The largest number of complaints have to do with flight disruptions (88) and baggage problems (73), followed by ticketing (27), reservations (27) refusal to transport (21) and denied boarding (16). Of this group, the greatest decline in the last two years occurred in the case of ticketing complaints which stood at 131 in 2008-2009.

On the rail side, complaints continue to arise respecting rail crossings. The large majority of these (108 in the last year) are resolved by private negotiations. In six cases the Agency was required to issue a formal decision. Since 2007 the Agency has had the authority to resolve disputes relating to railway noise and vibration. At present an advisory committee is examining the issue of measurement standards and it is anticipated that a report will be finalized before very long.

The Agency has authority under the *Canadian Environmental Assessment Act* to consider the impact of rail construction and, in the last year, was involved in 18 environmental assessments involving proposed rail line construction.

An issue before the Agency at present is the status of limited distribution tariffs, being hybrid (sharing elements of tariffs and confidential quotes) agreements between shippers and rail companies which are not specifically provided for by the *Canada Transportation Act*. It is anticipated that the Agency will issue a report on the appropriateness of such agreements this summer.

Marine disputes before the Agency predominately relate to coasting trade applications. The *prima facie* rule in Canada, as in most jurisdictions, is that the carriage of goods and passengers between two ports in Canada, and other commercial activity in Canadian waters is reserved to Canadian-registered ships. The Agency has jurisdiction to issue a licence to authorize a foreign ship to engage in commercial marine activity if it determines that there is no Canadian vessel available. Of the 22 marine disputes resolved last year, 20 were coasting trade disputes.

Resolving complaints by persons with disabilities remains a core function of the Agency. Recent developments have involved examination of complaints by persons with allergies, in particular allergies to nuts and pets. Carriers can continue to serve peanuts on board, but the Agency has ruled, in one case, that a carrier may be required to create a buffer zone within which foods containing nuts as a known product must not be served. A ruling respecting the accommodation which must be made for passengers with allergies to cats is expected soon.

An overriding issue affecting all accessibility cases is jurisdiction. At present a turf war between the Agency and the Canadian Human Rights Commission is underway. This began when the Commission decided to rehear a case the Agency had ruled upon. The Agency sought review in the Federal Court and was successful. However, the Commission has now appealed the matter to the Federal Court of Appeal. A hearing is scheduled for this autumn.

As to licensing matters, 1,514 air carriers held licences issued by the Agency as of the fiscal year end. Of these 710 were Canadian and 645 were held by nationals of the United States. The total number of licences held by these carriers was 2,245. There has not been any significant change in these numbers over the last two years.

Air charter permits continue to account for significant Agency activity: 230 passenger entity charters, 151 cargo entity charters and 429 passenger resalable charters were issued. It is notable that exemptions to charter regulations were granted in 669 cases, which is comparable to the numbers in the two previous years. While the report does not break this down into categories, it is clear to anyone who follows the Agency's decisions that most of these fall into well known groups: exemptions from the old charter "fences" which have not been applied for decades, from the need to give advance notice of certain executive aircraft charter operations, from minimum filing periods, and from the requirement of having a place of business in Canada. One of the Agency's identified objectives for the three year period which began on April 1 is the revision of the *Air Transportation Regulations* and it is likely that many of the anachronisms in those regulations which make these exemption applications necessary will be addressed and streamlined. The Agency's report also recognizes the fact that some of the decisions it makes relating to licensing and charter permits are routine and would be best handled by staff. At present it has no jurisdiction to delegate these matters. In its assessment of the *Canada Transporta-*

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tion Act, the Agency recommends to Parliament that it consider giving the Chair and CEO the power to delegate non-discretionary or routine decisions.

The larger regulatory issues which have occupied the Agency of late on the air side include making tariffs available on any website through which transportation is sold. This is an ongoing program and 100% of Canadian air carriers are now in compliance. As of year end, 54 foreign carriers were in compliance and some 15 were in discussions with the Agency. The Agency conducted three reviews of financial fitness of applicants for licences to operate air services using aircraft with 40 or more seats in 2010-2011. It also conducted four major reviews of Canadian ownership and control status. On the international scene six new bilaterals were negotiated with Trinidad and Tobago, Jamaica, Switzerland, Qatar, Egypt and Brazil.

One of the main functions of the Agency in the rail mode is the establishment of revenue caps for the movement of western grain. This process involves a complicated annual assessment which results in a cap on the annual revenues Canadian Pacific and Canadian National are allowed to earn on the transportation of grain. If a carrier exceeds its cap the Agency is charged with assessing financial penalties. As of December 2010, both CN and CP were found to be within their cap. This was the first year since 2003 that neither carrier exceeded its cap.

The Agency is currently considering issues related to interswitching rates and determination of net salvage value of railway assets in connection with the discontinuance of rail lines.

On the marine side, the major regulatory activity in the last year has been the promulgation of an updated guideline for coasting trade licence applications.

As noted above, the Agency has also released a three year strategic plan. We will not review the details in this note, but only mention that the plan identifies three priorities. These are, very briefly, more efficient dispute resolution services, modernization of essential regulations, and maintenance of knowledgeable and competent staff. In its review of legislation for which it is, at least in part responsible, the Agency makes a number of significant recommendations which will be the subject of subsequent notes. Progress with the identified priorities and regulatory reform is in the interest of the entire Canadian transportation industry.

Canadian Transportation Agency
Annual Report 2010-2011

Official Languages Act (cont'd)

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that the language in the *Montreal Convention* precluded any claims that were not explicitly contemplated in it.

Having acknowledged this finding in the jurisprudence, Justice Bédard wrote that "since I feel bound by the [*Warsaw/ Montreal*] caselaw, despite my reservations, I conclude that there is a conflict between the *Montreal Convention* and the Court's remedial power set out at subsection 77(4) of the *OLA*." Justice Bédard held that not making an award of damages would result in a significant weakening of the *OLA*, but that to do otherwise would be to depart from the Canadian and international case law interpreting the *Convention*.

The Court resolved the conflict by allowing the *OLA* to prevail on two grounds.

First, Justice Bédard noted that the legislature explicitly gave precedence to the *OLA* by providing that the substantive sections of the *OLA* identified in s. 82(1) were to prevail over other legislative enactments (even though the remedial provisions that flowed from the substantive sections of the legislations were not explicitly enumerated under s. 82(1)).

Secondly, the Court gave precedence to the *OLA* in order to give effect to its quasi-constitutional status. Justice Bédard observed that making this determination does not undermine Canada's international obligations or integrity because the *OLA* does not affect any air carrier other than Air Canada, given its status as an "old federal institution".

She commented that "[a] departure from the *Montreal Convention* to ensure efficacy of proceedings aimed at enforcing Air Canada's duties as to the official languages has no effect on the other signatory countries of the *Convention*, and does not weaken the *Convention* or imperil the integrity of the uniform liability regime it enshrines. … [T]his is a very minor circumvention of the *Montreal Convention* that has no impact on the liability of the other carriers subject to the *Convention* or Canada's treaty obligations; thus the remedy and penalties set out in the *OLA* receive their full effect."

The Court then turned to the issue of general damages. Citing authority for the fact that there is always an element of arbitrariness in assessing damages for moral prejudice, Justice Bédard ordered that Mr. and Mrs. Thibodeau should each receive $1,500 for each breach of the *OLA* (for a total of $12,000).

The Court then had to decide whether Air Canada had systemic problems in complying with the *OLA*, and, if it did, whether an institutional order was appropriate.

In order to decide this, the Court examined the incidence of similar complaints against Air Canada.

In this respect, Air Canada argued, when considering the number of points of contact between the airline and its passengers, that the number of complaints filed is low.

The Court noted though, that this was not a reliable indicator of Air Canada's actual performance. It cited the fact that Jazz admitted that two Anglophone-only flight attendants were assigned at least 200 times on flights that required Francophone service, but no other complaints were filed under the *OLA*.

The Court found that "it would have been fundamental for Jazz, after all these years, to have a staff assignment system that identifies all routes requiring bilingual personnel. This is the least that can be done to ensure that services are provided in compliance with the *OLA*." (emphasis appears in decision).

Justice Bédard also expressed surprise that Jazz did not have a monitoring system that enabled it to determine the number of times no bilingual flight attendant is assigned to a flight requiring services in French.

Although the Court acknowledged that Air Canada and Jazz were making efforts to comply with their linguistic duties, it held that the Thibodeau breaches were not isolated.

As a result, the Court found that systemic problems did exist. Air Canada was ordered to "make every reasonable effort to fulfill all its duties under … the *OLA* and to ensure that it implements a monitoring process to allow it to identify and document occasions on which Jazz does not assign the required bilingual personnel on board flights that require service in French."

Finally, the Court had to address the request for $500,000 in punitive damages. It considered each of the breaches of the *OLA* as against the Thibodeaus and concluded that in only one case did the Air Canada staff display "a non-chalant attitude trivializing the [Thibodeau's] rights."

This was found to be an isolated incident that did not reveal a malicious, oppressive and high-handed attitude and as such did not call for such a remedy.

A modest amount for costs was awarded to the Thibodeaus for their success.

Thibodeau v. Air Canada, 2011 FC 876

End of the Line

In the February 2011 edition of *Transportation Notes*, we reported on a decision of the Newfoundland Court which dismissed Sikorsky Aircraft Corporation's ("Sikorsky") application to prevent Cougar Helicopters Inc. ("Cougar") from proceeding with a claim against it in that province. That decision was recently upheld by the Newfoundland and Labrador Court of Appeal.

This claim, for pure economic loss, arises from the crash of a Cougar–operated Sikorsky S-92 helicopter off the coast of Newfoundland in 2009. There was no contract between Cougar and Sikorsky because the helicopter was leased to Cougar by another party in the litigation.

In the appeal, Sikorsky challenged the applications judge's ruling that the action could proceed in Newfoundland. There were three issues to be decided by the court: (a) is the claim grounded in a real and substantial connection to the province of Newfoundland?; (b) do the courts in Newfoundland provide a convenient forum to determine the matter?; and (c) had Sikorsky attorned to the jurisdiction of Newfoundland in any event?

On the issue of "real and substantial connection", the appellate court relied particularly on the Supreme Court of Canada's decision in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 in which case the Court held:

> By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.

In this regard, the appellate court accepted the applications judge's finding that Sikorsky "knew or ought to have known that [the helicopter was] being operated in [Newfoundland]".

The Court was not persuaded by Sikorsky's argument that *Moran* did not apply to actions for pure economic loss. Rather, it cited another case in the Newfoundland court which applied *Moran* in those circumstances.

In the end, the Court found that there was no particular unfairness in having the matter heard in Newfoundland. It therefore upheld the applications judge's finding that the case had a real and substantial connection to the province of Newfoundland.

On the issue of whether Newfoundland was a convenient forum, the Court was similarly unsympathetic to Sikorsky's arguments. In applying the leading case on the issue, *Teck Cominco Metals Ltd. V. Lloyd's Underwriters* [20098] 1 S.C.R. 321, the appellate court determined that, in this case, there would be inconvenience to one of the parties whether the matter was heard in Newfoundland or Connecticut (Sikorsky's preferred forum).

Moreover, although Sikorsky argued that the matter would be governed by the law of Connecticut, the appellate court held that this was not necessarily correct — particularly because the action was grounded in tort law, rather than contract. In any event, the Court noted that the Newfoundland Court would be able to apply Connecticut law, if it were found to govern.

The Court also considered and rejected Sikorsky's argument that Cougar was "forum shopping" when it commenced the claim in Newfoundland, because Connecticut does not permit recovery for pure economic loss in products liability cases. The Court refuted this argument, in part, by noting that Sikorsky could just as easily be accused of the same tactic — as it preferred to have the matter adjudicated in a jurisdiction in which the claim would be precluded.

The Court found that Sikorsky had not established that the applications judge erred in assessing the above factors or in his determination that Newfoundland was a convenient forum for Cougar's claim.

Having determined that the dispute has a real and substantial connection to Newfoundland, and that that province was a convenient forum to hear the matter, the issue of attornment became moot.

However, the Court provided some remarks in *obiter* on the issue of whether Sikorsky had attorned to the jurisdiction by challenging the discontinuance of Cougar's claim against a co-defendant, Helicopter Support, Inc. The Court decided not to make a determination on this point.

Rather, it stated that the case law on this point requires "refinement" by setting out the dilemma faced by a litigant who wishes to challenge the jurisdiction of a Court, as follows:

> The case now before this Court provides an example of the untenable position in which the defendant may be placed, having to choose whether to abandon its jurisdictional challenge or to take action it deems necessary in the event that the jurisdictional challenge proves to be unsuccessful.

Sikorsky's appeal was dismissed, with costs.

Sikorsky v. Lloyd's TSB General Leasing (No. 20)
2011 NLCA 49

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